

### **REMARKS**

This Supplemental Amendment and Reply is a resubmission of Applicants' March 11, 2003 Supplemental Amendment and Reply now believed to be in correct format. In particular, the Amendment to the Claims section has been amended so that the claims are 1 and 1/2 spaced as required by MPEP 608.01(m) and 37 CFR 1.52(b)(2)(i). Applicants respectfully submit that this Reply in conjunction with the March 11, 2004 Reply are now in proper format and respectfully request entry and consideration of the same.

Claims 1-11 are pending. Claims 12-17 are withdrawn from consideration. Claims 1-11 have been amended. The specification has been amended as set forth in more detail herein. Now new matter has been added. Applicants respectfully reserve the right to file continuing applications.

### **Objections**

Claims 2 is objected to for assertedly including subject matter which has been non-elected due to a restriction requirement. The Office Action states that such non-elected subject matter has been withdrawn from consideration. Applicants respectfully traverse the withdrawal of alleged non-elected subject matter for at least the following reasons. SEQ ID NO: 10 is merely the complement to SEQ ID NO:9. SEQ ID NOS: 1, 5, 11, 15, 17, 21, 23, 25, 27, 30, 31, 33, 34, 35 and 36 are merely variants of the SEQ ID NO: 9, and SEQ ID NOS: 12, 16, 18, 22, 24, 26, 28 are complements to said variants. Applicants respectfully submit that upon finding of an allowance for SEQ ID NO: 9 the Examiner must examine each of SEQ ID NOS: 1, 5, 10, 11, 12, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 33, 34, 35 and 36 in this application. To do otherwise would penalize Applicants for having done more research and providing specific examples of variants of the elected species. Applicants respectfully request reconsideration and reversal of the withdrawal of alleged non-elected subject matter.

### **Sequence Compliance**

The application assertedly fails to comply with the requirement of 37 C.F.R. §§ 1.821 - 1.825 because page 22, line 2, complementary sequence to probe number 1 does not have a SEQ ID NO cited along with the sequence in the specification. Inasmuch, the specification has been amended on page 22, line 2, to insert a sequence identifier.

The specification is further corrected and a Sequence Listing was submitted on March 11, 2004 to comply with the requirements of an application containing a nucleotide and/or amino acid sequence 37 C.F.R. §§ 1.821 - 1.825.

On March 11, 2003, Applicants attached a Sequence Listing in paper and computer readable format. The paper copy and computer readable copy of the Sequence Listing submitted on March 11, 2004 are the same. The Sequence Listing submitted on March 11, 2004 does not include new matter.

**Rejections Under 35 U.S.C. §112, second paragraph**

Claims 3-11 are rejected under 35 U.S.C. §112, second paragraph (indefiniteness), as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In particular, the Office Actions assertedly finds claim language to an isolated polynucleotide comprising a vector, host cell, transgenic plant or transgenic seed as vague and indefinite. Applicants respectfully traverse this rejection to the extent it applies to the herein claimed invention. The claims have been amended to recite a vector, host cell, transgenic plant or transgenic seed comprising the isolated polynucleotide of claim 1. Applicants respectfully submit that the claimed invention would not be subject to further restriction as the claimed invention remains drawn to the isolated polynucleotide of claim 1. Accordingly, Applicants respectfully request reconsideration and withdrawal of the rejection.

**Rejections Under 35 U.S.C. §112, first paragraph**

Claims 1- 11 are rejected under 35 U.S.C. §112, first paragraph (written description), as allegedly containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Applicants respectfully traverse this rejection for at least the following reasons.

Support for variants of SEQ ID NO: 9 is found on at least page 5, paragraph [19] which sets out that variants hybridize to SEQ ID NO:9 under certain hybridization conditions and have insulator activity. A person of skill in the art would not expect substantial variation among species encompassed within the scope of the claims because the hybridization conditions (i.e., 5x SSC and 42°C wash conditions) in combination with the coding function of DNA (i.e., insulator

activity) and the level of skill and knowledge in the art are adequate to determine that Applicants were in possession of the claimed invention. Moreover, the specification also sets exemplary variants of SEQ ID NO: 9 on page 22 in Table 1 and on page 28 in Table 3. Applicants respectfully request reconsideration and withdrawal of the rejection.

**Rejections Under 35 U.S.C. §102**

Claims 1-11 are rejected under 35 U.S.C. §102 as allegedly being anticipated by Millar et al. (May 1999). Applicants traverse this rejection to the extent the rejection applies to the herein claimed invention. Claims 1 and 11 have been amended to no longer recite "or fragment". Accordingly, Applicants respectfully request reconsideration and withdrawal of the rejection.

**CONCLUSION**


Entry of the Supplemental Amendment and Reply and substitute Sequence Listing submitted on March 11, 2004, and favorable consideration are respectfully requested.

**To the extent necessary, please grant any extension of time deemed necessary for entry of this communication. Please charge any deficient fees, or credit any overpayment of fees, to Deposit Account 500417.**

Respectfully submitted,  
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